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7 YGNACIO FLORES,

Plaintiff,

v.

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10 CITY OF HAYWARD, et al.,

Defendants.

No. C 10-2396 MEJ

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS STATE LAW  
CAUSES OF ACTION****(Docket #3)****I. BACKGROUND**

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14 Before the Court is Defendants City of Hayward (the “City”) and K. Landreth’s (collectively,  
15 “Defendants”) motion to dismiss Plaintiff Ygnacio Flores’ (“Plaintiff”) state law causes of action.  
16 (Dkt. #3.) Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for disposition  
17 without oral argument and hereby VACATES the September 23, 2010 hearing. Having reviewed  
18 the parties’ submissions, relevant legal authority, and good cause appearing, the Court GRANTS  
19 Defendants’ motion for the reasons set forth below.

**II. BACKGROUND**

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21 In his Complaint, Plaintiff alleges that on February 4, 2009, he was detained by two police  
22 officers while sitting on the front porch of the vacant residence at 1650 Hays Street in San Leandro.  
23 (Compl. ¶ 8, Dkt. #1.) His detention was based on suspicion of fleeing from the police during an  
24 earlier contact. (*Id.*) During the detention, Defendant Officer K. Landreth released his police dog  
25 on Plaintiff. (*Id.* at ¶ 9.) Plaintiff alleges he that he was not engaged in any “assaultive behavior,  
26 nor resisting arrest, nor attempting to interfere with police,” and that the “dog attack was entirely  
27 unjustified by any actions of [himself] and constituted an unreasonable and excessive use of force  
28 (*Id.* at ¶¶ 9-10.)

1 Plaintiff filed an administrative claim with the City on July 30, 2009. (Hom Decl., Ex. A,  
2 Dkt. #4.) On August 19, 2009, the City rejected the claim. (*Id.* at Ex. B.) Plaintiff subsequently  
3 filed his complaint on May 28, 2010, over eight month after the claim was rejected. (Dkt. #1.)  
4 Plaintiff's complaint does not allege that he complied with the California Tort Claims Act (the  
5 "Act") prior to filing suit. He simply alleges that he "is in compliance with notice of claims."  
6 (Compl. ¶ 6, Dkt. #1). Plaintiff alleges federal causes of action under 42 U.S.C. §§ 1983 and 1988,  
7 as well as state law causes of action. (Dkt. #1.)

8 Defendants filed their motion to dismiss on July 28, 2010. (Dkt. #3.) Plaintiff filed an  
9 Opposition on August 18, 2010, (Dkt. #13), to which Defendants filed a Reply on September 1,  
10 2010 (Dkt. #15).

### 11 III. DISCUSSION

12 Defendants move the Court to dismiss Plaintiff's state law causes of action pursuant to  
13 Federal Rule of Civil Procedure ("Rule") 12(b)(6) on the grounds that Plaintiff failed to comply with  
14 the California Tort Claims Act, Cal. Gov't Code § 910, *et seq.*, and the applicable statute of  
15 limitations for his state claims, and pursuant to Rule 12(b)(1) on the ground that the Court does not  
16 have a viable basis to exercise jurisdiction of Plaintiff's state pendent claims. (Defs.' Mot. at 1:25-  
17 28, Dkt. #3.)

18 In response, Plaintiff argues that he was in state custody from September 28, 2009 to  
19 February 15, 2010, and is therefore afforded a six-month extension of time in which to file his  
20 complaint pursuant to California Government Code section 945.6. (Pl.'s Opp'n at 2:18-22.)

21 Because the Court finds Defendants' Rule 12(b)(6) argument dispositive, it shall address it  
22 first.

#### 23 A. Request for Judicial Notice

24 As a preliminary matter, Defendants request that the Court take judicial notice of Exhibits A  
25 and B, attached to the Declaration of Randolph S. Hom, which are copies of Plaintiff's claim  
26 presented to the City on July 30, 2010, and the City's Notice of Rejection of Claim issued on August  
27 19, 2009. (Hom Decl., Exs. A, B, Dkt. #4.) Plaintiff has not filed an opposition to Defendants'  
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1 request.

2 Federal Rule of Evidence 201(b)(2) allows the Court to judicially notice facts “capable of  
3 accurate and ready determination by resort to sources whose accuracy cannot reasonably be  
4 questioned.” On a motion to dismiss, the Court may take judicial notice of matters of public record  
5 outside the pleadings. *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

6 Pursuant to Federal Rule of Evidence 201, a court may take judicial notice of a city’s official  
7 records. *Grassroots v. County of San Francisco*, 1994 WL 589359, at \*2 fn.1 (N.D. Ca. 1994). The  
8 Court need not accept as true the allegations that contradict facts which may be judicially noticed.  
9 *Mullis v. United States Bank Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

10 Here, the Court finds that the documents maintained by the City, including Plaintiff’s claim  
11 presented to the City on July 30, 2009, and the City’s Notice of Rejection of Claim issued on August  
12 19, 2009, are within the scope of Federal Rule of Evidence 201. Moreover, the content of the factual  
13 allegations in said documents, including the date of presentation of the claim and the issuance date  
14 of the City’s notice of rejection, are not subject to dispute. Accordingly, the Court GRANTS  
15 Defendants’ request and takes judicial notice of Exhibits A and B to the Declaration of Randolph S.  
16 Hom.

17 **B. Legal Standard**

18 Pursuant to Rule 12(b)(6), a defendant may seek dismissal of a complaint for failure to state  
19 a claim upon which relief can be granted. Rule 8, which provides the standard for judging whether  
20 such a cognizable claim exists, requires only that a complaint contain “a short and plain statement of  
21 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Thus, to survive a  
22 motion to dismiss, a complaint need not provide detailed factual allegations. *Bell Atlantic v.*  
23 *Twombly*, 550 U.S. 544, 555-56 (2007). However, “a plaintiff’s obligation to provide the ‘grounds’  
24 of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of  
25 the elements of a cause of action will not do.” *Id.* at 555 (citation omitted).

26 A plaintiff must allege “enough facts to state a claim to relief that is plausible on its face,”  
27 not just conceivable. *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual  
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1 content that allows the court to draw the reasonable inference that the defendant is liable for the  
2 misconduct alleged.” *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (citing  
3 *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but  
4 it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Thus, threadbare  
5 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
6 suffice.” *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity  
7 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 1950.

8 If the court dismisses the complaint, it “should grant leave to amend even if no request to  
9 amend the pleading was made, unless it determines that the pleading could not possibly be cured by  
10 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this  
11 determination, the court should consider factors such as “the presence or absence of undue delay,  
12 bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue  
13 prejudice to the opposing party and futility of the proposed amendment.” *Moore v. Kayport*  
14 *Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

15 **C. Application to the Case at Bar**

16 Here, the relevant inquiry is whether Plaintiff complied with the requirements of the  
17 California Tort Claims Act. To comply, a written claim must include “[a] general description of the  
18 indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of  
19 presentation of the claim.” Cal. Gov’t Code § 910(d). Pursuant to section 945.6(a) of the Act, any  
20 suit brought against a public entity must be commenced within six months after notice that the claim  
21 has been rejected by the municipality. *Id.* at §§ 913(a), 945.6(a). Section 945.6(b) of the Act  
22 provides an exception to the six-month requirement when a person is unable to commence a suit  
23 within the time prescribed because he has been sentenced to imprisonment in a state prison. Cal.  
24 Gov’t Code § 945.6(b). In such a case, the time limit for the commencement of suit is extended to  
25 six months after the date that the civil right to commence such action is restored to such person. *Id.*  
26 However, “the time shall not be extended if the public entity establishes that the plaintiff failed to  
27 make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so,

1 before the expiration of the time prescribed in subdivision (a)." *Id.* Thus, the time Plaintiff had to  
2 commence this suit should be extended unless Defendants can establish that he failed to make a  
3 reasonable effort to commence the suit.

4 The City's Notice of Rejection of Claim, which was addressed to both Plaintiff and his  
5 counsel, Frank L. Tridente, provides in pertinent part: "Subject to certain exceptions, you have only  
6 six months from the date this notice was personally delivered or deposited in the mail to file an  
7 action in California state court on this claim. (See California Government Code, section 945.6.)  
8 This warning does not apply to statutes of limitation for federal causes of action." (Hom Decl., Ex.  
9 B, Dkt. #4.) In his opposition, Plaintiff does not dispute that he received the City's rejection of his  
10 administrative claim on August 19, 2009. However, he maintains that he was unable to file a lawsuit  
11 against Defendants until after the time prescribed by the Act because he "had been sentenced to  
12 imprisonment in a state prison from September 28, 2009 to February 15, 2010." (Tridente Decl. at  
13 4:24-27, filed concurrently with Pl.'s Opp'n, Dkt. #13.)

14 Here, thirty-nine (39) days passed between August 19, 2009, the date on which the City  
15 rejected Plaintiff's claim, to September 28, 2009, the date on which Plaintiff's sentence to  
16 imprisonment commenced. And yet, in his opposition, Plaintiff fails to provide any reason why he  
17 did not file suit at an earlier date after his claim was rejected by the City. Instead, Plaintiff simply  
18 cites to section 945.6(b) and implies, without explanation, that the Court should apply the six-month  
19 extension. However, the six-month extension is not applicable unless Plaintiff made a reasonable  
20 effort to commence the suit in a timely manner. Cal. Gov't Code § 945.6(b). The Court finds that  
21 Defendants have shown that he did not. First, the Court notes that Plaintiff is represented by  
22 counsel, and counsel has failed to provide any reason why he could not make a reasonable effort to  
23 commence the present suit. Even in the event that his counsel did not have authorization to file suit  
24 at the time the City rejected the claim, Plaintiff has not shown that counsel could not locate him in  
25 prison and obtain his consent. Second, since Plaintiff received the City's rejection of his claim  
26 before his incarceration, nothing precluded him from filing a pro se legal action. Pro se legal actions  
27 are routinely filed by prisoners.

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1 Instead, Plaintiff chose to file suit in this action on May 28, 2010, over eight months after the  
2 City rejected his claim. Pursuant to section 945.6(b), a plaintiff can extend the filing period only if  
3 he has made a reasonable effort to commence the suit, or obtained a restoration of his civil right to  
4 do so. Cal. Gov't Code § 945.6(b). The Court finds no evidence that Plaintiff made a reasonable  
5 effort to commence the suit in a timely manner. Thus, since Plaintiff failed to file his Complaint in  
6 compliance with the statute of limitations, the Court has no pendent jurisdiction over his state causes  
7 of actions. Accordingly, all state law claims in the Complaint are DISMISSED WITH PREJUDICE.

8 **IV. CONCLUSION**

9 Based on the analysis above, the Court hereby GRANTS Defendants' motion and  
10 DISMISSES Plaintiff's state law causes of action WITH PREJUDICE.

11 **IT IS SO ORDERED.**

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13 Dated: September 2, 2010

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16 Maria-Elena James  
17 Chief United States Magistrate Judge  
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